

IN THE SUPREME COURT OF THE STATE OF NEVADA

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CASE NO.: 82475

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WESTERN NATIONAL MUTUAL INSURANCE COMPANY, A MINNESOTA  
CORPORATION

*Appellant,*

v.

WILLIAM HARRY RESH, AN INDIVIDUAL

*Respondent.*

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Appeal from Eighth Judicial District Court of Clark County Nevada  
(The Honorable Judge Eric Johnson)

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APPELLANT'S REPLY BRIEF

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WESTERN NATIONAL MUTUAL  
INSURANCE COMPANY, A Minnesota  
Corporation

Appellant,

v.

WILLIAM HARRY RESH, an individual,  
Respondent.

**Supreme Court Case No.  
82475**

District Court Case No.  
A775815

**APPELLANT’S REPLY BRIEF**

Appellant, Western National Mutual Insurance Company (“WNMIC”), pursuant to NRAP 28(a), by and through its counsel, Kurt C. Faux, Esq. and Jordan F. Faux, Esq. of The Faux Law Group, hereby submits its Reply Brief.

DATED this 13th day of December, 2021.

THE FAUX LAW GROUP

By:

  
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## **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

A. Parent corporations and listing any publicly held company that owns 10% or more of the party's stock:

Western National Mutual Insurance Company

Western National Insurance Group

B. The names of all law firms whose partners or associates have appeared for the party:

The Faux Law Group

C. Litigant pseudonyms: None

*Attorney of Record for Appellants*

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## **I. ARGUMENT**

### **A. Resh Is Not a Consumer Under the Statute and Does Not Qualify As a Beneficiary of the Bond Because the Relevant Transaction is the One Upon Which Resh's Claim is Based, Not the Original Purchase of the Vehicle.**

Both Parties agree that pursuant to NRS 482.345 only a consumer may make claim upon the WNMIC Bond at issue in this case. Both parties agree that under the words of the statute, a “consumer” means any person who comes into possession of a vehicle as a final user for any purpose other than offering it for sale.” NRS 482.345(10). The Parties do not dispute the underlying facts. Where the parties disagree, is which transaction is relevant in making the determination of whether a person is a consumer in the context of making claim upon a Motor Vehicle Dealer Bond.

Resh argues that he was a consumer when he purchased the Vehicle and therefore remains a consumer in any and all future transactions with regards to the Vehicle. Respondents Brief at 7, 9. Neither reason nor the statute support this interpretation.

WNMIC asserts that whether a person is a consumer depends upon the specific transaction that gives rise to the purported claim. If, as part of the

transaction at issue, a person comes into possession of a vehicle (or was supposed to come in to possession of a vehicle) as a final user for any purpose other than offering it for sale, then that person is a consumer. If the transaction does not include the person coming into possession of a vehicle as a final user for any purpose other than offering it for sale, then the person is not a consumer.

It is not relevant whether the person is a board-certified cardiologist or if they are in the business of buying and selling cars themselves. If any person goes to a car dealership and as part of the transaction is to come into possession of a vehicle as a final user for any purpose other than offering it for sale, then that person is a consumer. Their vocation is not relevant.

In the specific transaction upon which Resh's claim is based, Resh fails to meet any of the statutory criteria that would make him a consumer entitled to make claim upon the Bond. First, Resh's intention in initiating his transaction with Compadres (the Bond Principal here) was "to sell the aforementioned vehicle through auction with the assistance of Robert Larson, who assisted me [Resh] in selling vehicles in the past." JA 00256 at ¶5. Resh was not the final user, he wanted to find a new user. *Id.* Next, Resh did not come into possession of the Vehicle, rather, he dispossessed himself as owner of the Vehicle by turning physical possession, title, and keys over to Robert Larson so the Vehicle could be sold at auction. JA 00256 at ¶6; JA 00258 at ¶¶5-6, 8-9. Resh was not acting as a

consumer in the transaction upon which his claim is based. He was acting as a consignor. Therefore, he is not entitled to make claim upon the Bond as a matter of law.

The following graphic may be helpful:

<b><u>Requirements to Qualify as a Consumer Under NRS 482.345(10)</u></b>	<b><u>Resh's Action</u></b>	<b><u>Joint Appendix Citation</u></b>
"come into possession of a vehicle..."	Resh surrendered physical possession, keys, and title to Robert Larson/the auction.	JA 00256 at ¶6; JA 00258 at ¶¶5-6, 8-9
"...as final user..."	Resh no longer wanted the Vehicle and wanted to find a new "user"	JA 00256 at ¶5-6
"...for any purpose other than offering it for sale."	Resh wanted to sell the Vehicle at auction and did sell the Vehicle at auction.	JA 00256 at ¶5-6; JA 00258 at ¶¶5-6, 8-9; JA 00271-00274.

Resh does not meet any of the criteria for qualifying as a consumer under the statute as a matter of law. That Resh was a consumer when he purchased the Vehicle is not relevant to whether he was a consumer when he entered into his arrangement with Robert Larson to sell the Vehicle at auction through Compadres. In the transaction upon which Resh's claim is based, Resh is not a consumer, he is a consignor and therefore not entitled to make claim upon the Bond as a matter of law. Because Resh was not entitled to make claim upon the Bond, he also is not

entitled to recover attorney fees for making the claim. The District Court should be reversed.

This statute is so clear and unambiguous that the District Court should have granted WNMIC's Motion to Dismiss and awarded WNMIC fees under NRS 18.010 because both Resh's and the District Court's interpretation of the statute is not reasonable. Just because Resh was wronged does not mean he is entitled to recover from the Bond. The Legislative History is clear on this issue.

**B. The Legislatures' Intent in Deciding Who May Make Claim Upon Bonds Under NRS 482.345 Was to Limit the Right to Make Claim to Consumers Buying Cars From Car Dealerships and No One Else**

WNMIC maintains that the definition of "consumer" in the statute is not ambiguous and that Resh's interpretation is not reasonable on its face. "When a statute is plain and unambiguous, this court will give that language its ordinary meaning and not go beyond it." *State v. Allen*, 119 Nev. 166, 170, 69 P.3d 232, 235 (2003). "We only turn to a statute's legislative history when the statute is ambiguous." *Sharpe v. State*, 350 P.3d 388, 391 (Nev. 2015). Accordingly, the legislative history is irrelevant. However, even if the statute was not unambiguous, the Legislature's intent in revising the parameters of who can make claim upon the Bond was to limit it to consumers buying vehicles from car dealerships for their own use and not for re-sale.



In *Western Sur. Co. v. ADCO Credit, Inc.*, 127 Nev. Adv. Op. No. 8, 251 P.3d 714 (Mar. 17, 2011), this Court determined under the previous version of the statute that “any person” included corporate entities, specifically holding the following:

NRS Chapter 482 provides no definition for the term “person,” see NRS 482.010.137, nor is the scope of NRS 482.345 constrained by limiting language.

...

Based on the plain language of NRS 482.345, the statute is intended to extend protection to a class larger than simply consumers, and the bond's protections are not limited to consumers, as it states that the bond must provide that “any person injured by the action of the dealer” may apply for compensation from the bond.

*Western Surety Co. v. ADCO Credit, Inc.*, No. 54442, 5 (Nev. 2011).

In response, the Legislature altered NRS 482.345, adding that only consumers may make claim and defining consumers as set forth in section (10). The Legislative Digest explained further: “This bill amends NRS 482.3333, 482.345 and 482.346 to provide that bonds procured pursuant to NRS 482.3333 and 482.345 and deposits made in lieu of such bonds pursuant to NRS 482.346 may be used to compensate only a consumer, for any loss or damage established, and no other person.” See A.B. 282, Legislative Counsel’s Digest, 77th Leg., 27th Spec. Sess. (Nev. 2013); See also JA at 00097—000101.

Further, the very language cited by Resh which he asserts supports his argument, does the exact opposite. For example, Resh cites the testimony of Dan Wulz, Deputy Executive Director, Legal Aid Center of Southern Nevada, Inc., who says: “The only entities that lose under the bill are creditors of car dealers like finance companies. Under the bill they can no longer make a claim on the bond. But dealer creditors have available to them other means of obtaining security. They can require a dealer to purchase a separate bond of some kind or put up collateral in their contract as a condition for doing business.” *Minutes of the Meeting of the Assembly Committee on Transportation*, 2013 Leg., 77th Sess. 16-17; 3:15 PM (Nev. Apr. 4, 2013).

As argued in WNMIC’s Opening Brief, that is the exact situation in this case with Resh. As a consignor, Resh had available to him other means of obtaining security, such as UCC-1 filing, as set forth in NRS 482.31771—482.31776. Resh is not acting as a consumer by selling his Vehicle at auction through a “family friend.” Selling is not consuming under any reasonable definition of the word “consume.”

Resh is asking this Court to expand the plain language of NRS 482.345(10) to include consignors and sellers. The Legislature has already limited this Court’s prior decision in *Western v. ADCO* such that only consumers and not people

selling cars (like Resh) or financing cars (like ADCO) may make claim upon the Bond.

The other comments from other Legislators are also congruent with the plain language and WNMIC's interpretation. When read in context, the conversation between Assemblywoman Carlton and Assemblyman Aizley demonstrates that the relevant transaction was to be only the original transaction between the consumer and the seller:

**Assemblyman Aizley:**

Apparently the intent of the bill was to protect the consumer. There are other protections for other areas. They can have their own insurance, or their own bonding. The intention of this was for the consumer, but the court interpreted differently. It is trying to narrow it down to original intention.

**Assemblywoman Carlton:**

I am looking at the definition of consumer. It means "any person who comes into possession of a vehicle as a final user for any purpose other than offering it for sale." Does that mean this goes from owner to owner to owner, because cars can have multiple owners?

**Assemblyman Aizley:**

I believe it means in the original transaction the consumer who buys from the auto agency or the seller, and that is it.

*Minutes of the Meeting of the Assembly Committee on Transportation, 2013 Leg., 77th Sess. 15; 3:15 PM (Nev. Apr. 4, 2013).*

The conversation between Assemblyman Hardy and Scott McKenna, Committee Counsel, demonstrates that a company could be a consumer as long as they intend to be the end user, not intending to resell the vehicle at retail.

**Assemblyman Hardy:**

I would like to have clarification of what a consumer is. It is any individual that purchases a vehicle? It is not just an individual; it can be a company, or anybody that purchases. Is that correct?

**Scott McKenna, Committee Counsel:**

I would like to clarify that my reading of the text of A.B. 282, would define consumer as an end user who is not intending to resell a vehicle at retail. That is what I think the term comes down to. I can provide more detail if that is desired.

*Minutes of the Meeting of the Assembly Committee on Transportation, 2013 Leg., 77th Sess. 40, 3:00 PM (Nev. Apr. 9, 2013) (emphasis in original).* This position was the same that Scott McKenna gave to the same question at the earlier committee meeting on April 4, 2013:

**Assemblyman Hardy:**

Is a sole proprietor business a consumer?

**Dan Wulz:**

I would think so. A sole proprietor would be a consumer if they went to buy a car from a car dealer, I would think.

I will say that the definition of consumer in the bill was language selected by the LCB, and I did not select that specific language. All I asked for was that the definition be as broad as possible and cover a consumer. In my opinion, the answer to your question is yes, but we might have to ask Legal on that.

**Chairman Carrillo:**

We will see if Mr. McKenna has a comment about that.

**Scott McKenna, Committee Counsel:**

In looking at the definition of consumer that is in A.B. 282, that is a definition of consumer that has been patterned in several places around NRS, including just this one example: NRS 370.020. The way that definition has been used in the past, and with its exclusion of repeated sales in a wholesale or retail manner, the idea is generally to say **that a consumer is an end user and not somebody who will be further selling the product to someone else**. In response to the question that was asked, I would say that a sole proprietor would be considered a consumer, provided he had no further intent to resell the item in question.

*Minutes of the Meeting of the Assembly Committee on Transportation*, 2013 Leg., 77th Sess. 15; 3:15 PM (Nev. Apr. 4, 2013); *See* Answering Brief at 16.

None of these conversations indicate any intention to expand the definition of consumer to include sellers or consignors. In fact, they do the opposite and demonstrate that, as Assemblyman Aizley explains: “The bond was originally intended to protect the consumer, someone who purchases an auto and something goes wrong and he has a claim against the seller.” *Minutes of the Meeting of the*

*Assembly Committee on Transportation*, 2013 Leg., 77th Sess. 15; 3:15 PM (Nev. Apr. 4, 2013).

This Court should not expand the definition of consumers to include the types of transactions embodied by Resh's transaction here. Resh was not purchasing a vehicle from Compadres. Resh was selling the Vehicle to someone else at auction and in fact did sell the Vehicle at Manheim Auto Auction to Select Motors of San Mateo, California for \$145,000.00. JA at 00271. But even before the auction, Resh already surrendered title, physical possession, and the keys to the auction house in order to dispossess himself of the Vehicle. JA at 00258.

Therefore, Resh did not own the vehicle at the time of sale. Robert Larson listed the Vehicle for sale under Compadres' name. JA 00258 at ¶5-6. Resh submitted no evidence that Compadres was even aware of the sale until after the auction was already completed. JA 00258.

The purpose of the Bond is not to protect a certain class of people in any situation, but to protect a specific person in a specific type of transaction: a consumer transaction where the person wishes to take possession of a vehicle for any purpose other than offering it for sale. Resh's purpose in this specific transaction was not to take possession of a vehicle for any purpose other than offering it for sale, but to dispossess himself of vehicle in exchange for money. In fact, he no longer possessed or even legally owned the Vehicle at the time of sale

or when Compadres took his money. JA 00258. Resh is not a consumer in this transaction and is not entitled to make claim upon the Bond nor was the Bond intended to protect him in this situation. The District Court should be reversed.

**C. Resh Has Failed to Prove Compadres Auto Sales Committed An Act Covered by the Statutory Bond.**

As the Plaintiff, it is Resh's obligation to prove he is entitled to recover from the Bond. The Bond is statutorily limited as to what it covers. The Bond covers "any breach of a consumer contract, deceptive trade practice, fraud, fraudulent representation or violation of any of the provisions of this chapter or chapter 41, 97, 104, 104A or 598." NRS 482.345(5). It is up to Resh to prove that Compadres committed one of the enumerated acts. The only thing Resh has asserted is that Compadres stole the sales proceeds of the Vehicle.

Stealing under this circumstance as alleged by Resh does not constitute breach of a consumer contract because Resh is not a consumer, was not the owner of the vehicle at the time, and alleges no contract between himself and Compadres. Deceptive trade practice is defined by statute in NRS 598 generally but specifically NRS 589.0915—0925. Neither stealing, as alleged here, nor conversion are included in any of those definitions. Stealing also does not satisfy the elements of fraud or fraudulent misrepresentation as set forth in *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446–47, 956 P.2d 1382, 1386 (1998). Despite the opportunity in the

Court below, Resh failed to point to or even allege violation of NRS 482, 97, 104, 104A or 598.

Resh fails to assert how the alleged stealing in this circumstance fits into any of those categories in his Answering Brief. Instead, Resh attempts some sort of moral argument. It is not immoral for an insurance company to deny coverage for a fire if the policy only covers floods. Likewise, it is not immoral for the surety here to assert there is no coverage because stealing in this circumstance is not a covered act under the Bond statute. WNMIC agreed to accept only certain risks and this is not one of them. The Legislature could have added it, but it did not. Resh could have alleged some other violations or pointed to an argument to support how stealing fits into some category or another but he did not. That is because it does not fit. Stealing may be a bad act, but that does not mean it is covered by the statutory Bond. Declaring the surety's defenses unworthy of response does not transform the claim into a covered act, even if Resh were a consumer.

**D. Robert Larson Bears the Liability in This Case**

Larson himself admits that he was acting as a motor vehicle dealer under Nevada law because he offers vehicles for sale at auction saying, quote "I am in the business of assisting individuals in selling their vehicles at auction and have been over the past five years." JA 00258 at ¶2. Resh is correct that WNMIC



submitted no evidence that Larson was acting as a motor vehicle dealer because Larson himself admits it in his Affidavit submitted by Resh. The fact that he is also a family friend does not change the other facts admitted by Larson.

Larson offered Resh's Vehicle for sale at auction without a dealer's license. JA 00315-316. No evidence has been submitted that he was licensed. It also explains his need to list the car under another dealer's name at the Manheim auction. JA 00258 at ¶5. The facts show that if Larson had been a licensed dealer himself, Compadres would not have been involved at all and neither would WNMIC. *See Transamerica Premier Ins. v. Nelson*, 110 Nev. 951, 956 (Nev. 1994) ("in the case of a surety sued on a bond, the surety generally has no culpability whatsoever, and the entirety of its obligation arises from its undertaking on behalf of the ... principal obligor.")

**E. Resh Is Not Entitled to Collect Attorney Fees and Costs Because He Was Not a Valid Claimant Upon the Bond**

In the Answering Brief, Resh appears to agree with WNMIC that if this Court determines that Resh is not entitled to recover from the Bond, then he is not entitled to recover attorney fees and costs either. Because Resh is not a consumer he can have no claim upon the Bond and can be awarded no attorney fees and costs for pursuing his claim.

## **II. CONCLUSION**

In conclusion, WNMIC requests that the Court reverse the District Court's conclusions of law that Resh is a consumer that is entitled to make claim upon the Bond and entitled to recover attorney fees and costs in pursuit of his claim against the Bond. WNMIC seeks an order from this Court that based upon the facts alleged, Resh is not a consumer as a matter of law and that he is not entitled to make claim or recover any amounts from the Bond and that judgment should be entered in favor of WNMIC.

## **III. CERTIFICATE OF COMPLIANCE WITH RULE 28.2**


1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or -type- volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages, it is proportionally spaced, has a typeface of 14 points or more and contains 3,240 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for

any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

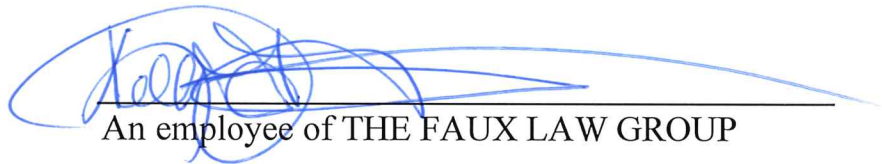
Dated this 13th day of December, 2021.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13th day of December, 2021, I served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to the following via the Court's electronic filing system:

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